

ORIGINAL
FILE

BEFORE THE
Federal Communications Commission

WASHINGTON, D.C. 20554

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DEC 15 1992

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of

Implementation of the
Cable Television Consumer
Protection and Competition
Act of 1992

Cable Home Wiring

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MM Docket No. 92-260

REPLY COMMENTS OF
TIME WARNER ENTERTAINMENT COMPANY, L.P.

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Dated: December 15, 1992

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SUMMARY

- Any rules implemented pursuant to Section 16(d) should not apply to common internal wiring within multiple dwelling unit buildings.

Congress' explicit intent is that any rules promulgated pursuant to Section 16(d) are not to "cover common wiring within the building" in a multiple dwelling unit ("MDU") context. If the Commission's home wiring rules were inappropriately extended to cover common wiring within MDU buildings, the resulting adverse consequences would be serious. Subscribers in buildings wired on a "loop-through" basis could be totally deprived of cable service; the opportunity for theft of service would increase; and competition in the multichannel video programming industry would be adversely affected. A regulation that allows all competing multichannel video programming providers to install their own wiring in a MDU building would foster competition in accordance with Congress' intent.

- The Commission's home wiring rules must not apply to the disposition of home wiring prior to the termination of cable service, or after the resumption of cable service.

Both the plain language of Section 16(d) and the legislative history state that the Commission's home wiring rules are to apply to the disposition only upon termination of cable service. Accordingly, proposals that alternate service providers should be permitted to tap into cable wiring prior to the termination of service must not be enacted. During the time that the cable

operator is providing cable service to the subscriber, the cable operator is solely responsible for compliance with various FCC standards, such as signal leakage and picture quality.

Therefore, the cable operator must retain full control over the home wiring prior to termination of service. Moreover, a "shared tenant" approach to home wiring does not promote fair competition.

- The telephone inside wiring model is not entirely appropriate for cable home wiring.

While some principles should be taken from the telephone inside wiring model, a wholesale application of that model is not a perfect fit for cable home wiring, and should, therefore, be embraced selectively. For example, the telephone inside wiring model does not have to contend with the problem of signal leakage, but this is a very real problem in the cable context, for which the cable operator is held responsible. Adoption of the telephone model would also undercut existing written agreements concerning ownership of the home wiring, and would not address the problem of radio frequency signals entering into the cable wiring and interfering with cable service.

- Section 16(d) cannot be applied to effect a taking of a cable operator's property without just compensation.

The Commission's home wiring rules should not declare that the subscriber automatically owns the home wiring upon installation because such a rule violates the plain language of

Section 16(d), and effects an unconstitutional taking without just compensation. Most cable operators are not fully compensated for home wiring upon installation, therefore, to declare that ownership of that wiring automatically vests in the subscriber upon installation is to take property from the cable operator without paying compensation, thereby violating the fifth amendment of the Constitution. Time Warner supports an approach that protects the consumer through full disclosure of options for disposition of home wiring upon termination of service, while insuring that the cable operator's property is not taken without just compensation, and yet allows flexibility for cable operators to employ differing home wiring arrangements as local conditions warrant.

- Any rules adopted by the Commission should be minimally restrictive.

Complaints concerning the ownership of internal cable wiring are rarely generated by residential cable subscribers. Since the ownership of internal cable wiring generates such minimal controversy, any rules promulgated by the Commission concerning the ownership of home wiring should be minimally restrictive so as not to create problems that would not otherwise exist. Specifically, any Commission home wiring rules should not place undue emphasis on any presumed future benefit of ownership of the home wiring.

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REPLY COMMENTS

Time Warner Entertainment Company, L.P., ("Time Warner") hereby respectfully submits these reply comments in response to comments filed pursuant to the above-captioned Notice of Proposed Rule Making¹ released by the Federal Communications Commission ("Commission") on November 5, 1992. Time Warner is a partnership, which is primarily owned (through subsidiaries) and fully managed by Time Warner Inc., a publicly traded Delaware corporation. Time Warner is comprised principally of three unincorporated divisions: Time Warner Cable, the second largest operator of cable television systems nationwide; Home Box Office, which operates pay television programming services; and Warner Bros., which is a major producer of theatrical motion pictures and television programs.

¹Notice of Proposed Rule Making in MM Docket 92-260, __ FCC Rcd __, adopted November 5, 1992 ("NPRM").

I. INTRODUCTION

Several of the comments filed in response to the NPRM have set forth proposals for home wiring rules that contain unsound reasoning and are based on principles that are not supported by the plain meaning of the home wiring statute or by Congressional intent. As Time Warner shall explain more fully below, the proposals offered by certain commenters would frustrate the Commission's proper implementation of rules in accordance with Section 16(d) of the Cable Television Consumer Protection and Competition Act of 1992,² and would disserve the public interest. Rather, the Commission should adopt rules consistent with the proposed regulation submitted by Time Warner as Appendix 1 to its Comments.

II. ANY RULES IMPLEMENTED PURSUANT TO SECTION 16(d) SHOULD NOT APPLY TO COMMON INTERNAL WIRING WITHIN MULTIPLE DWELLING UNIT BUILDINGS.

Congress' intent with respect to including the common wiring of multiple dwelling units ("MDUs") in any rules promulgated pursuant to Section 16(d) is clear -- Section 16(d) is "not intended to cover common wiring within the building."³ This unambiguous direction from Congress must be followed, and the

²Pub. L. No. 102-385, 106 Stat. 1460, § 16(d) (1992), to be codified at 47 U.S.C. § 544(i) ("Section 16(d)").

³H.R. Rep. No. 628, 102d Cong., 2d Sess. 119 (1992) ("House Report").

common wiring of MDUs should not be subject to the Commission's new home wiring rules.⁴

Some commenters have asserted that the Commission's home wiring rules should cover all cable wiring within a building.⁵ Nowhere in the comments, however, is any support offered for this contention. Conversely, those commenters, including Time Warner and New York City, who urge exclusion of common wiring in MDUs from the home wiring rules are following Congress' specific instruction regarding the scope of the term "home wiring,"⁶ and the plain language of Section 16(d), which, on its face, applies only to wiring installed "within the premises" of a subscriber.

If the Commission were to extend its home wiring rules to include the common wiring in MDUs, several adverse consequences would result, including the possibility of total deprivation of cable service to residents of MDUs wired on a "loop-through" basis,⁷ and the frustration of future competition in the

⁴Accord Comments of National Cable Television Association, Inc. at 7-8 ("NCTA Comments"); Comments of New York City Department of Telecommunications and Energy at 7-8 ("New York City Comments"); Comments of Tele-Communications Inc. (Proposed Rules for Cable Home Wiring -- § 76.703(c)) ("TCI Comments").

⁵See Comments of Liberty Cable Company, Inc. at 10-11 ("Liberty Comments"); Comments of NYNEX Telephone Companies at 5-6 (in MDUs with no active electronics located in premises, customer control of wiring should extend to grounding block or interface point on exterior of premises) ("NYNEX Comments").

⁶See House Report at 118-19.

⁷See New York City Comments at 7-8; TCI Comments (Proposed Rules for Cable Home Wiring -- § 76.703(c)); Time Warner Comments at 11-12.

multichannel video service industry.⁸ In the case of MDUs wired on a "loop-through" basis, any common wiring that happens to be located within subscriber premises, e.g., in closets or vertical conduits, must also be excluded from the Commission's home wiring rules because any tampering with such wiring could adversely affect the cable signal to all "downstream" subscribers,⁹ and poses additional theft of service problems.¹⁰ Both New York City and the New York State Commission on Cable Television, two regulatory authorities with vast experience with cable television service in MDUs, concur with Time Warner that ownership of common wiring in MDUs could present serious problems for other subscribers and for cable operators.¹¹

As Time Warner discussed in detail in its comments,¹² inclusion of the common wiring of MDUs in the Commission's home wiring rules will not foster competition in accordance with the pro-competitive goals of the Commission and of Congress. In fact, competition can be maximized in the MDU context without reaching the issue of whether the common wiring should be included in the Commission's home wiring rules because if each multichannel video programming distributor who wished to serve

⁸See NCTA Comments at 9-11; Time Warner Comments at 7-9.

⁹Accord New York City Comments at 7-8.

¹⁰See Time Warner Comments at 12-14.

¹¹See New York City Comments at 7-8; Comments of New York State Commission on Cable Television at 16-17 ("New York Commission Comments").

¹²See id. at 7-9.

the residents of an MDU simply installed its own wiring and made its service available to the residents, the residents could choose whichever service they wanted, and not all residents would be forced to choose the same service. In such a scenario, the ownership of internal wiring would not serve as an impediment to subscriber selection among any available service providers.

III. SECTION 16(d) DOES NOT APPLY TO HOME WIRING PRIOR TO THE TERMINATION OF CABLE SERVICE, OR AFTER THE RESUMPTION OF CABLE SERVICE.

Several commenters have proposed rules that would permit alternate providers to tap into cable home wiring prior to subscriber termination of cable television service.¹³ Such rules, they argue, would enable the subscriber to receive other services simultaneously with cable television through cable home wiring and would, therefore, foster competition.¹⁴ However, such rules disregard the plain language of Section 16(d)¹⁵ as well as

¹³See, e.g., Comments of American Public Power Association at 6-7 ("APPA Comments"); Comments of Bell Atlantic at 4-6 ("Bell Atlantic Comments"); Comments of Media Access Project at 2 & n.2; Comments of Multiplex Technology, Inc. at 3-4 ("Multiplex Comments"); NYNEX Comments at 4; Comments of Pacific Bell and Nevada Bell at 1 ("Pacific Bell Comments"); Comments of United States Telephone Association at 6 ("USTA Comments").

¹⁴See NYNEX Comments at 4; USTA Comments at 6; APPA Comments at 6-7.

¹⁵The assertion made by Media Access Project at note 2 of its comments that "[i]t would. . . appear that it is within the Commission's discretion under the [1992 Cable] Act to determine that subscriber ownership of cable wiring begins not just at termination of service, but at the time of installation" is incorrect. It is not within the Commission's discretion to enact home wiring rules that apply prior to termination of cable service because Section 16(d) specifically limits the scope of

Congress' intent for the application of rules promulgated pursuant to Section 16(d).¹⁶ Indeed, allowing unrelated entities to have free use of the internal wiring being used for distribution of cable service would directly contravene Congress' admonition that it "does not intend that cable operators be treated as common carriers with respect to the internal cabling installed in subscribers' homes."¹⁷

Congress' explicit intent that rules promulgated pursuant to Section 16(d) apply only to the disposition of home wiring after termination of cable service underscores the premise that Time Warner has asserted must be recognized -- that cable wiring, at least when such wiring is provided and installed by the cable operator, is the personal property of the cable operator unless or until the cable operator yields its ownership of such wiring by agreement or by operation of local law.¹⁸ Ownership issues aside, however, it is undisputed that while the cable operator is providing service to a subscriber, the cable operator is

such rules to the period after a subscriber terminates service.

¹⁶See House Report at 118 ("This section [16(d)] does not address matters concerning the cable facilities inside the subscriber's home prior to termination of service."); S. Rep. No. 92, 102d Cong., 1st Sess. 23 (1991) ("Senate Report") ("This provision addresses the issue of what happens to the cable wiring inside a home when a subscriber terminates cable service.").

¹⁷House Report at 118-19.

¹⁸See Time Warner Comments at 3.

responsible for compliance with FCC signal leakage, picture quality and other technical standards.¹⁹

During the time a subscriber is receiving cable service, the cable operator must retain full control over the home wiring because the Commission's rules hold him legally responsible for the signal that is transmitted through that wiring.²⁰ Subscribers and other service providers simply should not have access to home wiring that is still being used for the provision of cable service to the subscriber. If another service provider were to obtain access to the cable home wiring and tamper with it in order to initiate some other service through that wiring, the tampering would inevitably result in signal leakage or deteriorated picture quality, for which the Commission holds the cable operator responsible.²¹ Moreover, if numerous providers

¹⁹The suggestion by Multiplex Technology, Inc. that the subscriber is responsible for signal leakage if he owns the internal wiring is incorrect. Multiplex Comments at 8. See Amendment of Parts 15 and 76 Relating to Terminal Devices Connected to Cable Television Systems, 2 FCC Rcd 3304, 3308 (1987).

²⁰By the same token, Time Warner concurs fully with the New York Commission and others that subsequent video service providers should bear full responsibility for safety and reliability of internal wiring after the subscriber has terminated service from a previous cable operator. New York Commission Comments at 17; Comments of National Association of Telecommunications Officers and Advisors, et al. at 8. The original installer should be free of liability upon such termination of service. Similarly, the subsequent provider must be held accountable for inspecting and bringing the wiring up to current standards upon initiation of new service.

²¹See 47 CFR §§ 76.611, 76.605.

were allowed to tap into the same home wiring, the source and causes of the leakage would become impossible to trace.²²

Additionally, the competitive consequences of a "shared tenant" approach to home wiring cannot be ignored. The Commission has been repeatedly warned of the monopolistic results which would flow from a "one-wire" policy.²³ To this end, the Commission has sought to promote facilities-based competition among providers of telecommunications services.²⁴ While serious questions remain regarding the economic viability of duplicative wire-based broadband facilities, it is nevertheless evident that such a scenario will never arise under the "one-wire" regime advocated by certain commenters. Rather, as explained by Time Warner in its Comments, each multichannel video programming distributor should be encouraged to install and maintain its own internal wiring, which will facilitate the consumer's ability to receive service from one or more providers and to make smooth transitions among such providers. Indeed, it would greatly disserve the goals of promoting fair competition and encouraging investment in improved facilities to allow competitors to reap the economic benefits of providing service over facilities

²²See New York Commission Comments at 7-9.

²³See, e.g., Telephone Company-Cable Television Cross-Ownership, CC Docket No. 87-266.

²⁴See Telephone Company-Cable Television Cross-Ownership, CC Docket No. 87-266, Second Report and Order and Second Further Notice of Proposed Rulemaking, 7 FCC Rcd 5781, ¶¶ 109-10 (1992); Cellular Communications Systems, CC Docket No. 79-318, Report and Order, 86 FCC 2d 469, ¶ 16 (1981), Reconsideration, 89 FCC 2d 56, ¶¶ 6-8 (1982).

installed by a cable operator where the competitor has made no capital investment in such facilities. Such a result would directly conflict with the Commission's goal that its home wiring rules "should not discourage cable investment in continuing to extend service to unwired homes by failing to account adequately for the property, contractual, and access rights of cable operators."²⁵

An additional problem with allowing third parties to "piggy back" on a cable operator's wiring is that of impressing too much signal energy on the cable system. Cable systems are typically designed to carry only a certain amount of power, and if other services tap into cable wiring and transmit additional signals through that wiring, the tuners in the subscribers' television receivers and converter boxes may not be able to handle all the signal energy coming through the wiring. This could result in picture distortion from poor signal quality.²⁶ Since the cable operator is solely responsible for signal quality,²⁷ other service providers should not be permitted to tap into the cable wiring prior to the subscriber's termination of cable service.

²⁵NPRM at ¶ 2.

²⁶If customers are allowed to use cable wiring to receive additional services from other entities while still cable subscribers, more signal energy may be impressed on the cable system than the tuners in the TV receivers and cable converters can handle. If the cable system is used to transfer even relatively low amounts of 60 Hz power, that energy may "saturate" ferrite cores in splitters and filters and generate objectionable "hum bars" in nearly all video channels on the cable system.

²⁷See 47 CFR § 76.605.

A further proposal involving the disposition of home wiring prior to the termination of cable service involves the appointment of an agent, who could be a competing multichannel video programming distributor, to "arrange for and, if necessary, implement the termination of existing cable television service" from the home wiring.²⁸ Such an agent, under Liberty's proposal, would be appointed prior to the termination of cable service, and would "assist" in the process of terminating such service. Besides being outside the scope of Section 16(d) because this agent would be involved in the disposition of cable home wiring prior to the actual termination of service, such an agent could not possibly be an agent of the cable operator.²⁹ When a cable operator terminates service, it must assure that the cable is properly capped to prevent signal leakage, an activity for which Commission rules hold the cable operator responsible.³⁰ Under Liberty's proposal, the agent would supposedly "assume responsibility for all damage to third party equipment and for signal leakage."³¹ However, even if the agent were to assume responsibility for signal leakage, the Commission still holds the cable operator liable for such leakage, thus, an agent cannot

²⁸Liberty Comments at 7.

²⁹If anything, the subsequent service provider should be deemed the agent of the subscriber to assure that the agreed upon compensation for the internal wiring is paid to the cable operator before such subsequent provider is allowed to use such facilities for its own economic gain.

³⁰See 47 CFR § 76.611.

³¹Liberty Comments at 7.

perform the duties of termination of a subscriber's cable television service and assume responsibility for leakage, particularly without a contractual arrangement between such agent and the cable operator. In addition, a cable operator terminating a subscriber's service has a legitimate interest in retrieving other property, such as converter boxes and remote control units, which are clearly outside the scope of "home wiring." A cable operator cannot be forced to entrust this responsibility to an "agent" not of its choosing.

In situations where a new subscriber, or a previous subscriber who decides to again subscribe to cable service, has existing home wiring, the cable operator may disconnect any other services that have been connected to the home wiring and otherwise bring it into compliance with good practice to minimize the potential for signal leakage and ingress, and maximize signal quality. The cable operator should be able to charge for this service. In the event the subscriber does not want the existing wiring upgraded, he can be offered a new installation of wiring at an appropriate charge. If this is not satisfactory with the potential subscriber, the cable operator may decline to connect to deficient wiring.

During the period of time that a former subscriber no longer subscribes to cable, the cable operator cannot be responsible for leakage or any hazards that result from the operator's lack of access to maintain the wiring. This includes situations caused

by modification of the wiring, and by electrical connections while it is not under the control of the cable operator.

IV. THE TELEPHONE INSIDE WIRING MODEL IS NOT ENTIRELY APPROPRIATE FOR CABLE HOME WIRING.

Many commenters seem enamored with a wholesale application of the telephone inside wiring model directly to cable home wiring.³² These commenters argue that a primary reason for such application is that the two technologies are converging and may, one day, be delivered to the subscriber over the same internal wiring.³³ Thus, the commenters assert, the Commission should try to keep the regulatory schemes for the two types of wiring as identical as possible in order to avoid potential, future regulatory conflicts. While the telephone inside wiring model provides many principles that can, and should, be applied to cable home wiring, it is not a perfect model for cable wiring,³⁴ and it should be embraced selectively.

The Blade Comments set forth several examples of how the telephone wiring model differs from the cable home wiring

³²See, e.g., APPA Comments at 14-17; Bell Atlantic Comments at 1, 4-6; Comments of BellSouth Corporation at 2-3 ("BellSouth Comments"); Comments of Building Industry Consulting Service International at 3-4 ("BICSI Comments"); Comments of Consumer Electronics Group of the Electronic Industries Association at 5-9; NYNEX Comments at 3-4.

³³See BellSouth Comments at 2-3; BICSI Comments at 3; Comments of Utilities Telecommunications Council at n.3; Pacific Bell Comments at 1.

³⁴See Joint Comments of Blade Communications, Inc., et al. at 7 ("Blade Comments").

situation, including the fact that there is no problem of signal leakage with which to contend in the telephone wiring context.³⁵ What the Blade Comments do not address, however, is the significance of the cable operator's responsibility to maintain the home wiring and control signal leakage, even where the subscriber owns or controls the wiring.³⁶ Moreover, those who advocate wholesale application of the telephone home wiring model conveniently ignore that telephone companies typically recover the full cost of internal wiring in their installation charges, whereas cable operators typically perform such installations substantially below cost, or even for free.³⁷

If the telephone inside wiring model were to be directly applied to cable home wiring, the subscriber would obtain absolute control over the cable wiring upon installation.³⁸ In such a situation, the cable operator is still legally responsible for controlling signal leakage, but the subscriber has absolute control over the internal wiring. The subscriber must not be permitted to have such control over internal wiring during provision of cable service because the cable operator must be

³⁵Id. at 7-10.

³⁶See Comments of Nationwide Communications Inc. at 2 (the ownership of cable home wiring is less critical than the maintenance of such wiring); New York Commission Comments at 4-5 (technical performance of internal wiring is not of minor consequence in the performance of a modern cable television system).

³⁷See infra note 50 and accompanying text.

³⁸E.g., NYNEX Comments at 4.

able to exercise control over the wiring in order to fulfill its obligation to control signal leakage.³⁹ Moreover, allowing the subscriber to have control over the wiring before termination of cable service is contrary to the plain language of Section 16(d) and to the intent of Congress.⁴⁰

In addition to signal leakage concerns, cable wiring is also subject to signal ingress if it is tampered with or installed improperly, whereas telephone wiring is not subject to such interference. If radio frequency signals enter into cable wiring, those signals can interfere with the performance of devices connected to cable wiring and can eventually interfere with the video quality and reliability of cable service to all subscribers on the system. The telephone model offers no safeguards for this problem because it does not exist with regard to telephone wiring.

Differences in risks to human safety between telephone and cable installations also must be considered. Television receivers include high voltages to operate the picture tube. These voltages are in the range of twenty to thirty thousand volts. Most telephone devices have internal power limited to just a few tens of volts. The difference in shock and fire hazard is tremendous. Moreover, unlike the relatively thin wires used in telephone connections, the outer shield of a coaxial cable is a low resistance conductor of electricity. It is also

³⁹Accord New York Commission Comments at 7.

⁴⁰See discussion supra, at part III.

connected, by regulation and for safety reasons, to the power system ground in the home. If the power system connection to ground fails, the cable wiring can be a significant conductor of this electricity. If inadequate components or installation techniques are used, the results can be hazardous. Accordingly, for all of the foregoing reasons, cable operators have a legitimate interest in restricting a subscriber's unfettered ability to "remove, replace, rearrange or maintain" cable home wiring, at least while cable service is still being provided to such subscriber.

Finally, adoption of the telephone inside wiring model would undercut existing written agreements between cable operators and subscribers concerning ownership of the cable home wiring both during provision of cable service and after termination of such service. Some commenters contend that these agreements should not be binding because the subscriber is merely signing a cable subscription agreement containing boilerplate language that guarantees the cable operator ownership of the home wiring, even after termination of cable service.⁴¹ These subscription agreements, however, are valid preexisting agreements between cable operators and their subscribers. As such, they should not be subject to any retroactive application of new Commission rules regarding the disposition of home wiring after termination of cable service, and they cannot be subject to any new Commission

⁴¹See WJB Comments at 6; Comments of the National Private Cable Association and Maxtel Cablevision at 6.

rules regarding the disposition of home wiring during provision of cable service because such rules are beyond the scope of Section 16(d) and this rulemaking.⁴²

V. SECTION 16(d) CANNOT BE APPLIED TO EFFECT A TAKING OF A CABLE OPERATOR'S PROPERTY WITHOUT JUST COMPENSATION.

Several commenters have asserted that the Commission's home wiring rules should declare that the subscriber automatically owns the home wiring upon installation.⁴³ In some instances, the commenters do not even believe that the subscriber should have to compensate the cable operator when ownership of the home wiring has been taken from the cable operator and vested in the subscriber upon installation.⁴⁴ Such a rule is contrary to Congress' intent, raises a serious question of constitutionality, and should, therefore, not be implemented.

⁴²See Defense Comments at 1 (any existing contracts should be grandfathered and the Commission's rules should apply prospectively only); see also Time Warner Comments at 21 (discussion of preexisting contractual arrangements concerning the ownership of internal wiring).

⁴³See Liberty Comments at 5; Comments of WJB-TV Limited Partnership at 5 ("WJB Comments"); Comments of Wireless Cable Association International, Inc. at 7 ("Wireless Cable Comments"); see also TCI Comments at 3 (Commission's rules should automatically vest ownership of home wiring in subscribers upon voluntary termination of service).

⁴⁴See Liberty Comments at 5 (cable operators have already been compensated for home wiring through service and installation fees, therefore, they do not need to be paid an additional amount when Commission rules declare that the home wiring is owned by the subscriber); WJB Comments at 5-6 (except in limited circumstances involving certain MDU buildings, WJB's proposed rule does not provide any sort of compensation to the cable operator when the home wiring is declared to belong to the subscriber).

Congress has clearly stated that it intended that "subscribers who terminated service should have the right to acquire wiring. . .in their dwelling unit."⁴⁵ Thus, a rule declaring automatic subscriber ownership upon installation of home wiring defies Congress' intent in two ways. First, Congress only intended for the Commission's home wiring rules to apply to subscribers who have terminated cable service. Thus, a rule that automatically gives subscribers home wiring ownership upon installation of such wiring and initiation of cable service extends beyond Congress' intent, and beyond the plain language of Section 16(d).⁴⁶

Second, by using the term "acquire," Congress did not mean that subscribers who had terminated service would simply receive the home wiring without the necessity of appropriate compensation to the cable operator. As the Secretary of Defense correctly asserts in its comments, a fifth amendment taking⁴⁷ problem could

⁴⁵House Report at 118 (emphasis added).

⁴⁶Section 16(d) provides that "the Commission shall prescribe rules concerning the disposition, after a subscriber to a cable system terminates service, of any cable installed by the cable operator within the premises of such subscriber" (emphasis added). See also discussion supra, at part III.

⁴⁷See U.S. Const. amend. V ("nor shall private property be taken for public use without just compensation"). It is not the taking itself that offends the Constitution, but, rather, the lack of compensation. "Taking" is "an inherent power of government that exists independent of the Constitution which only imposes conditions on its exercise." M. Berger and G. Kanner, "Thoughts on the White River Junction Manifesto: A Reply to the 'Gang of Five's' View on Just Compensation for Regulatory Taking of Property," 19 Loy. L.A. L. Rev. 685, 707 (1986) (footnotes omitted).

arise if ownership of the home wiring were to shift automatically to the subscriber.⁴⁸ Congress obviously did not intend for the Commission to create rules that result in unconstitutional takings without payment of just compensation.

Liberty contends that cable operators have already been adequately compensated for the cost of the home wiring through service and installation fees, therefore, additional compensation upon the vesting of home wiring ownership in the subscriber is unnecessary.⁴⁹ Liberty's assertions, however, are incorrect. As Time Warner and the New York Commission note in their comments, most cable operators offer home wiring installations at a rate below cost, and sometimes even without charge.⁵⁰ Therefore, the contention that cable operators have already been compensated for the home wiring is without merit and does not alleviate concerns about a fifth amendment taking problem under a rule granting automatic subscriber ownership of home wiring upon installation without payment of compensation to the cable operator. The National Association of Telecommunications Officers and Advisors, et al., would go even further by advocating a rule which presumes that ownership of a cable operator's internal wiring automatically shifts to the subscriber even where installation

⁴⁸See Comments of the Secretary of Defense at 3 ("Defense Comments").

⁴⁹Liberty Comments at 5.

⁵⁰New York Commission Comments at 12; Time Warner Comments at 26; see also TCI Comments at 7-8.

charges are below cost or are not imposed at all. As explained above, such a rule would be patently unconstitutional.

Time Warner understands that some cable operators may be willing to relinquish all claims to ownership of internal wiring, without charge, upon a subscriber's termination of service.⁵¹ Still others may cede ownership of the internal wiring upon installation.⁵² Such differing approaches may be related to individual operators' marketing strategies, installation charges, repair and maintenance fees, additional outlet rates, etc. In any event, appropriate flexibility can be achieved through Time Warner's approach which protects the consumer through full disclosure while insuring that a cable operator is not subjected to an involuntary taking of its property without just compensation.

VI. ANY RULES ADOPTED BY THE COMMISSION SHOULD BE MINIMALLY RESTRICTIVE.

The New York Commission points out that rules concerning the ownership of internal wiring, even upon termination of service, may "prove more disruptive than constructive."⁵³ The reason for such a statement is that rarely has the issue of ownership of the wiring generated complaints by residential subscribers in New York, which is consistent with Time Warner's experience in other

⁵¹See TCI Comments at 6-8.

⁵²See, e.g., T-V Transmission, Inc. v. County Board of Equalization of Pawnee County, 338 N.W.2d 752 (Neb. 1983).

⁵³New York Commission Comments at 13.

areas throughout the country where it operates.⁵⁴ Since the question of internal wiring ownership seems to generate little complaint, Time Warner agrees with the New York Commission that any rules promulgated by the Commission on this issue should be as minimally restrictive as possible to fulfill the Commission's obligations under Section 16(d).⁵⁵ Minimally restrictive rules pursuant to Section 16(d) must avoid issues relating to home wiring prior to the termination of cable service. Rather, Congressional goals in adopting Section 16(d) can be fully carried out by adopting rules, as advocated in Time Warner's initial comments, which assure that, upon initiation of cable service and installation of internal cable wiring, all options for the disposition of such wiring upon termination of service are clearly communicated to the subscriber in writing.

Time Warner further agrees with the New York Commission that any rules implemented pursuant to Section 16(d) should be carefully considered so that inappropriate emphasis is not placed on the presumed benefit of acquiring home cable wiring.⁵⁶ Too

⁵⁴See id.; New York City Comments at 5; Letter from Peter O. Price of Liberty Cable, dated December 1, 1992, attached hereto as Exhibit 1 ("internal wiring within an apartment has never been the subject of protest let alone litigation. It has constantly been conceded that the internal wiring of an apartment is accessible to any provider of telephone or television service which the resident elects."); but see Liberty Comments at 6 ("there have been disputes over who actually installed and/or paid for Cable Home Wiring and thus whether it is part of the MATV").

⁵⁵See New York Commission Comments at 13-14.

⁵⁶See id. at 15-16.